a

PUBLIC PROSECUTOR

v.

ROBERT BOON TECK CHUAH & 2 ORS.

HIGH COURT MALAYA, PULAU PINANG
b TUAN JEFFREY TAN JC
[CRIMINAL CASE NO: 47-4-92]
21 NOVEMBER 1994

EVIDENCE: *Evidence of statement by person not called as witness - Proof - Admissibility - Whether only provable by direct evidence - Whether all such evidence hearsay - Evidence Act*
c *1950 s. 60(1).*

EVIDENCE: *Oral evidence - Oral evidence sought to clarify police report which was not tendered - Whether admissible - Whether excluded by s. 92 Evidence Act - Police report thereof - Whether documentary evidence - Evidence Act 1950 ss. 91 & 92*

The three accused in this case were charged with two offences of trafficking dangerous drugs
d under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980) read with s. 34 Penal Code. At the trial a witness for the prosecution testified in effect, that *"I received instructions from ASP Harris Wong to arrest four male Chinese in a blue Proton Saga WBX 6879 and a red Proton Saga KU 773. I mean ASP Harris Wong instructed me to arrest two male Chinese in WBX 6879 and two in KU 773*". The defence objected to this evidence and submitted that the statement ought to be curtailed and only that part of the statement which said " *I received instructions from ASP*
e *Harris Wong*" should have been admitted as the rest was hearsay and therefore inadmissible. This apart the defence also objected to the oral clarification by a witness of his police report (which was not tendered) and contended that such oral clarification of the report was excluded by ss. 91 and 92 of the Evidence Act.

Held:

f **[1]** The hearsay rule does not exclude all assertions of persons other than the witness who is testifying, but only such assertions as are relied upon as evidence of truth of that which was asserted. In the premises the purpose why a statement is introduced will decide whether such evidence is admissible or not. Such evidence is hearsay if it is proposed to admit an out-of-Court assertion as truth of facts contained therein but not when it is only to prove the fact that the statement was made.

g **[2]** The objected oral evidence in this case, apart from being truly instructive, was free of factual content of facts in issue or facts to be proved. Clearly that evidence lack factual assertions and was only a recitation of the spoken words heard by the witness. Illustrations (b) and (c) of the meaning of "fact" in s. 3 of the Evidence Act designate both spoken words and that heard as facts, and consequently the witness herein was only giving direct evidence of a fact (spoken words) that could be heard and was actually heard by him, in agreement with s. 60(1)(b) Evidence Act. That
h evidence, therefore, is not hearsay and is admissible.

[3] Section 92 of the Evidence Act will come into operation when the written instruments referred to in that section have been proved under s. 91. Section 92, hence, is not intended to exclude oral evidence if there is a document, but only where the document is documentary evidence admitted hitherto in accordance with the provisions of the Evidence Act. In the instant

i

proceedings the police report of the witness was not proved, and as such there was no proof or admission of the report. That report is not documentary evidence and s. 92 therefore does not apply.

[Objections overruled]

Cases referred to:
Teper v. R [1952] AC 486 ***(refd)***
Public Prosecutor v. Ng Lai Huat & 4 Ors. [1990] 2 MLJ 427 ***(refd)***
Re: Soo Leot [1956] MLJ 54 ***(refd)***
Ratten v. The Queen [1972] AC 378 ***(foll)***
Leong Hong Khie v. Public Prosecutor ***(dist)***
Tan Gong Wai v. Public Prosecutor [1986] 2 MLJ 206 ***(dist)***
Schilling v. Accidental Death Insurance Co., [1858] 1 F. & F. 116 ***(refd)***
R v. Chapman [1969] 2 Q.B. 436 ***(refd)***
Emperror v. Gulabu [1913] 35 All 260 ***(refd)***
Keng Huat Film Co. Sdn. Bhd v. Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 ***(refd)***
Ah Mee v. Public Prosecutor [1967] 1 MLJ 220 ***(foll)***
Public Prosecutor v. Tay Bee Seng [1993] 1 CLJ 526 ***(foll)***
Public Prosecutor Lee Eng Kooi [1993] 2 CLJ 534 ***(foll)***
Subramaniam v. Public Prosecutor [1956] 1 WLR 969 (foll)

Legislation referred to:
Evidence Act 1950, ss. 60(l)(b), 91, 92 & 99

Other sources referred to:
Sarkar on Evidence, Vol. 1 p. 1201

For the 1st. accused - V. Sithambaram; M/s. Kumar, Sitham & Co.
For the 2nd. accused - Ranjit Singh; M/s. R. Rajasingam & Co.
For the 3rd. accused - Tan Hock Chuan; M/s. Syarikat Kam Woon Wah
For the public prosecutor - Ishak bin Mohd. Yusoff, DPP (Puan Jeleha bt. Abu Baidah with him, FC)

JUDGMENT

Jeffrey Tan JC:
The above accused were tried on the following 2 charges:

First Charge:

> bahawa kamu bersama-sama pada 4hb. Januari 1991, lebih kurang 5.25 petang di kilometer 15 Jalan Butterworth-Alor Setar, Bumbung Lima, Kepala Batas, Seberang Perai (U) di dalam Daerah Butterworth, di dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya, iaitu 498 gram heroin dan oleh itu kamu telah melakukan kesalahan di bawah Seksyen 39B(l)(a) Akta Berbahaya 1952 (Semakan 1980) yang boleh dihukum dibawah Seksyen yang sama dan dibaca bersama dengan Seksyen 34 Kanun Keseksaan

Second Charge:

> bahawa kamu bersama-sama pada 4hb. Januari 1991, lebih kurang 5.25.petang di kilometer 15 Jalan Butterworth-Alor Setar, Bumbung Lima, Kepala Batas, Seberang Perai (U) di dalam Daerah Butterworth, di dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya, iaitu 3,320 gram monoacetymorphines dan oleh itu kamu telah melakukan kesalahan di bawah Seksyen 39B(l)(a) Akta Berbahaya 1952 (Semakan 1980) yang boleh dihukum dibawah Seksyen yang sama dan dibaca bersama dengan Seksyen 34 Kanun Keseksaan

During the prosecution's presentation of the *specie facti* the defence objected to:

(1) the oral evidence of a witness who said, "PPP Haris Wong juga maklumkan saya untuk menangkap 4 lelaki Cina yang berada di dalam kereta Proton Saga WBX 6879 berwarna biru dan kereta Proton Saga KU 773 berwarna merah. Maksud saya, PPP Haris Wong mengarah saya menangkap 2 lelaki Cina berada di dalam WBX 6879 dan 2 berada di dalam KU 773" as hearsay, and urged its curtailment to a bare "I received instructions from PPP Haris Wong", without any revelation of the words of instructions, and,

(2) the oral clarification by a witness of his police report (which report was not tendered) for reason that such oral clarification of the report is excluded by ss. 91 & 92 of the Evidence Act.

Objection (1) was not taken lightly; the rule against the admission of hearsay evidence is fundamental (see *Teper v. R* [1952] AC 486), and it always remains for a litigant to prove a fact in issue by direct evidence. This hearsay rule, variously said, is to stave off and prevent concoction and fabrication of evidence, and accordingly, only direct evidence given on oath, tested by cross-examination is acceptable and admissible.

The modus probandi and the form that it will take to prove a fact or a fact in issue must *ex necessitate rei* be dependent on the facts of individual cases; in cases where oral evidence is relied on, s. 60(1) of the Evidence Act 1950, the codification of the common law hearsay rule, requires that it shall be direct,

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;

(c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which the opinion is held, it must be the evidence of the person who holds the opinion on those grounds.

Nonetheless, out of necessity or convenience there are exceptions as in s. 6, the codification of the common law doctrine of *res gestae*, and statements made under 4 circumstances set out in s. 32.

What amounts to hearsay however, is not exactly without difficulty, and its meaning found in the authorities of *Public Prosecutor v. Ng Lai Huat & 4 Ors.* [1990] 2 MLJ 427 and *Re: Soo Leot* [1956] MLJ 54 at 56, if not comprehensive then putative, yet concur in the view that:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made" : *Subramaniam v. Public Prosecutor* [1956] 1 WLR 965 at p. 969.

The hearsay rule therefore does not exclude all assertions of persons other than the witness who is testifying, but only such assertions as are relied upon as evidence of the truth of that which was asserted. In *Ratten v. The Queen* [1972] AC 378, Lord Wilberforce said at page 387:

> A question of hearsay only arises when the words spoken are relied on "testimonially", ie. in establishing some fact narrated by the words.

The purpose why a statement is introduced is the deciding factor, and is hearsay if it is proposed to admit an out-of-Court assertion as truth of facts contained therein but not when it is to prove the fact that the statement was made.

Objection (1) was therefore approached by an examination and scrutiny of the impugned statement for the presence of facts conveyed in words attributed to a witness not testifying, and if the "instructions" was a euphemism or a pretence. I found the "instructions" truly instructive both in form and content and also governing the further conduct of the witness, i.e. to arrest persons in vehicles identified to him. It was otherwise free of factual content, of facts in issue or facts to be proved. In *Leong Hong Khie v. Public Prosecutor* and *Tan Gong Wai v. Public Prosecutor* [1986] 2 MLJ 206, out-of-court statements relating to a conversation between a witness and an informer, were held by the Federal Court to be inadmissible. The impugned out-of-court statements, summarized by Seah F.J., a part of which I reproduce below :

(a) "PW1 and PW3 were informed by the 2 informers that there would be a transaction involving 8 lbs of heroin"

(b) "that the proposed transaction would take place that afternoon at Springtide Hotel and that they would arrive in a Mazda car Number ... accompanied by....."

suitably demonstrates a narration of factual and assertive content in statements, accredited in that case to an informer.

By comparison, the objected oral evidence lack factual assertions, and was a recitation of the spoken words heard by the witness. Illustrations (b) and (c) on the meaning of "fact" in s. 3 designate both spoken words and that heard as facts, and consequently the witness was giving direct evidence of a fact (spoken words) that could be heard and was heard by him, in agreement with s. 60(l)(b) of the Act.

Where assertions recited in Court are instructional and are words accompanying conduct, rather than words asserting or bringing forth facts, it will not be considered as just words but an act (see *Schilling v. Accidental Death Insurance Co*., [1858] 1 F. & F. 116); illustrative is *R v. Chapman* [1969] 2 Q.B. 436, where the English Court of Appeal, ruling on the admissibility of the following oral evidence, "We notified Dr. Din, he made an examination and he raised no objection to the provision of the specimen", affirmed the recorder's rejection of an objection for hearsay and further agreed with the recorder that either Dr. Din objected or not objected as a fact. Words in a statement equivalent to an act, are described in "Cross on Evidence 5th Edition" as operative words, and such operative words if relevant or in issue, will be receivable as direct oral evidence of an act under s. 60(1)(b).

A peremptory rejection of oral evidence for hearsay without an examination for factual content, will result in direct and even formal oral evidence as, "I was instructed by ABC to hand exhibits ... to EFG," or "I was instructed by ABC to arrest EFG", to culminate with a sterile and token "on instructions" testimony. This"on instructions" testimony fragments the connection between witnesses and events thereby holding back a fluid presentation of evidence, and is an undeserved outcome of a misdirected application of the hearsay rule.

Objections for hearsay are not taken up just because words spoken by another are repeated by a witness. There is valid cause when the words spoken and repeated set forth facts and arguments relied upon as truth, but not when factual content is absent in the statement or words spoken, the absence of which there cannot be a likelihood of any facts being relied upon testimonially.

On objection (2), it is accepted that ss. 91 to 99 subject to the provisos exclude parol evidence by documentary evidence; s. 91 provides that the contents of a document must be proved by the document itself (see *Emperror v. Gulabu* [1913] 35 All 260), and s. 92 provides that no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, or adding to, or subtracting from its terms and *proved in accordance with s. 91* (see *Keng Huat Film Co. Sdn. Bhd v. Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243) (italics mine).

Its relevance and applicability in criminal trials was settled in *Ah Mee v. Public Prosecutor* [1967] 1 MLJ 220 where the Federal Court per Ong Hock Thye FJ said at 223:

> Section 91 applies equally to criminal trials, no less than to civil proceedings... the report (police report of the rape victim) was information relating to the commission of an offence which "shall be reduced to writing" pursuant to s. 107 of the CPC, and s. 92 goes on to exclude all parol evidence seeking to contradict or vary what was set out in writing.

Recent decisions of *Public Prosecutor v. Tay Bee Seng* [1993] 1 CLJ 526 and *Public Prosecutor Lee Eng Kooi* [1993] 2 CLJ 534) both followed the case of *Ah Mee* and excluded parol evidence respectively seeking to vary a cautioned statement and a police report. Nevertheless, the documents in those decisions were proved according to s. 91 and undoubted documentary evidence; in the instant proceedings the"police report of the witness was not proved, and as such there was no proof of the report itself. Section 92 is expressed to exclude oral evidence seeking to contradict, vary..... the terms of any document proved according to s. 91. It is not intended to exclude oral evidence if there is a document, but only where the document is documentary evidence admitted hitherto in accordance with the provisions of the Evidence Act. I find endorsement from "**Sarkar on Evidence**" Vol. 1 page 1201 which reads:

> Section 92 comes into operation when the written instruments referred to in the section, have been proved under s. 91, that is either by the production of the document itself, or by the production of secondary evidence of it, where secondary evidence is admissible under s. 65. It is then that the section comes into play.

For the reasons above, I rejected both objections.